No. 75-1172

In The
Supreme Court of the United States

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,
Petitioner,

vs.

USAFORM HAIL POOL, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents pray that the Petition be denied.

OPINIONS BELOW

The opinion of the Court of Appeals rendered on November 20, 1975 is now officially reported at 523 F. 2d 744 (5th Cir. 1975). Respondents will refer to the opinions below by reference to Petitioner's Appendices A thru H, as well as to the official citations for those opinions which have been officially reported.

RESPONSE TO PETITIONER'S REASONS

RESPONSE TO PETITIONER'S REASON I:

The Court of Appeals' Decision That It Had Jurisdiction of This Cause (A) Is an Application of This Court's Prior Decisions, (B) Does Not Conflict With the Decision of Any Other Court of Appeals Reported to Date, and (C) Involves Such a Unique Set of Circumstances That Review by This Court Is Unwarranted.

A.

Petitioner launches its initial attack on the Court of Appeals' acceptance of jurisdiction of this cause on grounds that the Court's ruling violates the express provisions of Rule 4(a), F.R.A.P., Rule 77(d), F.R.Civ.P., and 28 USCA, § 2107.

The ruling of the Court below violates neither of the cited rules nor the statutory provision. Concisely stated, the holding of the Court of Appeals was that where there were unique circumstances present, *in addition to* the failure of the Clerk to discharge his duty under Rule 77(d), F.R.Civ.P., the District Court properly used its broad discretion under Rule 60(b)(6), F.R.Civ.P., in setting aside its judgment and re-entering it to preserve the right of appeal. This constitutes neither an application of, nor a repudiation of the rules and statute that Petitioner claims have been contravened.

Rule 4(a), F.R.A.P., provides the time for filing a notice of appeal after the entry of an appealable order or judgment, and further provides that an extension of thirty days in addition to the initial thirty days may be granted where there is a showing of excusable neglect.

Rule 77(d), F.R.Civ.P., states that the failure of the clerk to notify parties of the entry of an appealable order or judgment, *standing alone*, does not affect the time for filing the notice of appeal.

28 USCA, § 2107, similarly to Rule 4(a), F.R.A.P., provides that a court may extend the initial time for filing a notice of appeal for an additional thirty day period.

None of these provisions deal with the question of what the district court may or may not do under the authority of Rule 60(b)(6), F.R.Civ.P. Each of these provisions refers to the running of time from the entry of a judgment or order. It cannot be disputed that a district court has the authority, under some circumstances, to set aside a judgment based upon an application of Rule 60(b)(6) F.R.Civ.P. To contend otherwise is to contend that there is no sphere of application for that rule. When the court sets aside a judgment, that judgment becomes a nullity, to which the provisions of the rules and statute cited by Petitioner can have no application. If the district court properly uses its authority under Rule 60(b)(6) to set aside a judgment, and subsequently enters a new judgment, the provisions cited by Petitioner then have application only to the *new* judgment, the previous judgment then being void.

There can be no question that Respondents properly perfected their appeal from the re-entered judgment of the District Court dated January 14, 1974. The question remaining is whether or not the District Court properly used the provisions of Rule 60(b)(6) to set aside its initial judgment. While the authority of the district court under Rule 60(b)(6) should not be such

that it renders the rules and statutory provision cited by Petitioner inoperative, those rules and provision contain no express or implicit prohibition against the action taken by the District Court in this proceeding.

Petitioner has chosen to ignore most of the grounds asserted by the Court of Appeals in support of its holding that it had jurisdiction of this cause, choosing instead to represent the holding as being based upon the mere failure of the Clerk to notify counsel of the entry of the judgment. Respondents respectfully request this Court to note the carefully reasoned opinion of the Court of Appeals and consider the reasons given there for its holding. *Fidelity and Deposit Company* v. *Usaform Hail Pool, Inc.*, 523 F. 2d 744, 747-51 (5th Cir. 1975) (Pet.'s App. A., p. A-7 thru A-15). The holding is clearly based upon a finding of unique circumstances including:

1) diligent inquiry by counsel for Respondents until they were induced to cease by assurances of the Court that further inquiry was unnecessary;

2) failure of *both* sides to learn of the entry of the judgment;

3) the lack of prejudice to Petitioner;

4) the inevitability of appeal from any judgment the District Court could possibly have rendered.

Contrary to Petitioner's inference that this Court has not considered whether a district court in the exercise of its equity jurisdiction may restore an otherwise lost right to appeal, the "unique circumstances" doctrine has its origin in prior decisions of this Court. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 1962, 371 U.S. 125, 83 S. Ct. 283, 9 L. Ed. 2d 261. *Wolfsohn*

v. *Hankin*, 1964, 376 U.S. 203, 84 S. Ct. 699, 11 L. Ed. 2d 636, reh. den. 376 U.S. 973, 84 S. Ct. 1133, 12 L. Ed. 2d 87. *Thompson* v. *Immigration and Naturalization Service*, 1964, 375 U.S. 384, 84 S. Ct. 397, 11 L. Ed. 2d 404.

The *Thompson* case involved the same element of reliance on actions of the district court that was present in this case. In that case, the district court assured counsel that his post-judgment motions were timely and therefore tolled the running of the time for filing the notice of appeal. Counsel did not file a notice of appeal in reliance on this assurance until the court disposed of these motions. This Court concluded that counsel's reliance on the district court's statement that his motions were timely was reasonable, and that this constituted "unique circumstances" justifying the acceptance of jurisdiction.

While the *Thompson* case was not a Rule 60(b)(6), F.R.Civ.P., case, its rationale is identical to that applied by the Court below in holding that the District Court properly exercised its broad discretion under Rule 60(b)(6).

B.

Petitioner claims that conflict exists among the Courts of Appeal on this question. When the decisions cited by Petitioner as being in conflict with the decision of the Court below are closely analyzed, no conflict is found among the circuits on the narrow ground upon which the Court below held that it had jurisdiction.

Petitioner places primary reliance on *Hodgson* v. *United Mine Workers of America*, 433 F. 2d 118 (D.C.

Cir. 1972), and also cites the decision of the same Circuit in *Lord* v. *Helmandollar*, 384 F. 2d 780 (D.C. Cir. 1965), cert. den. 383 U.S. 928, 86 S. Ct. 929, 15 L. Ed. 2d 874, as being in conflict with the decision below. However, Petitioner has ignored the later decision of that Court in *Expeditions Unlimited Aquatic Enterprises, Inc.* v. *Smithsonian Institute*, 500 F. 2d 808 (D.C. Cir. 1974), which was cited by the Court below as being in accord with its decision in this case. 523 F. 2d at 750 (Pet.'s App. A, p. A-13). The court in *Expeditions Unlimited* distinguished both the *Hodgson* and the *Lord* cases on the grounds that 1) in each of those cases, counsel knew of the entry of the judgment in the time to perfect their appeals, and 2) there was no reliance on any action by the clerk or the district court in these cases which caused the problem. These elements are clearly present in this case, making it accord with the most recent holding of the Court of Appeals for the District of Columbia, and distinguishable from the prior decisions of that Court relied upon by Petitioner for conflict.

The decision cited by Petitioner from the Court of Appeals for the 2nd Circuit, *Radack* v. *Norwegian American Line Agency, Inc.*, 318 F. 2d 538 (2nd Cir. 1963), not only fails to conflict with the decision below, but in fact *supports* Respondents' position. Petitioner's one sentence description of *Radack* is extremely misleading, to the extent that it does not accurately portray the meaning of the paragraph from which it was taken, not to mention the holding of the case. The rest of the paragraph is crucial to the court's decision:

> "The rule [Rule 60(b)(6)] cannot be used to circumvent the 1947 Amendment to Rule 77(d) dealing with the effect of lack of notice on the running of time for appeal [cite omitted] nor is 60(b)(6) relief available for an unlimited time. The rule is still subject to both the reasonable time limitation and to the proper exercise of discretion by the district court considering all the circumstances present in a given case. The granting of such motion should be considered only when lack of notice has operated to prejudice a substantial right or remedy that would otherwise have been available." 318 F. 2d at 542-43.

The next to the last sentence of the opinion is also vital:

> "But if notice of the judgment was not sent, the judge has the power, in the exercise of a sound discretion, to grant relief under 60(b)(6)." 318 F. 2d at 543.

This case is one of the few cases cited by the Petitioner which involves the precise issue presented here, and actually *supports* the decision below.

The second case cited from the Second Circuit, *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 (2nd Cir. 1960), involved a denial of a motion to extend the time for appeal which was filed after the expiration of the initial 30 day period, and which stated no reasons which justified a finding of excusable neglect. In that case, counsel had notice of the judgment two days after it was entered but simply did nothing. This case has no bearing on the issue involved in the decision below and therefore cannot be in conflict with it.

From the Third Circuit, Petitioner has cited the case of *Sonnenblick-Goldman Corp.* v. *Nowalk*, 420 F.

2d 860 (3rd Cir. 1970). In that case, counsel filed an untimely motion which would have tolled the time for filing the notice of appeal had it been timely made. Unlike the *Thompson* case, *supra*, counsel relied on no action of the district court in failing to file the notice of appeal, and did not even bother to file a motion to extend the time for filing the notice based upon excusable neglect, although he had ample time to do so. This case did not involve an application of Rule 60(b)(6) F.R.Civ.P., and has no factual resemblance to the case at bar.

Petitioner cites from the Sixth Circuit *Knox Mutual Insurance Company* v. *Kallen*, 376 F. 2d 360 (6th Cir. 1967). In that case, the Court dismissed a cross appeal as untimely filed. The initial appeal was timely only by reason of an extension of time granted by the district court for excusable neglect. Without securing a similar extension, cross-appellant merely filed his cross appeal assuming that he was entitled to the benefit of the extension given to the appellant. This case does not involve failure to receive notice of a judgment, or reliance upon any action of the clerk or court, and does not involve an application of Rule 60(b)(6). In fact, it does not even involve a review of a denial for an extension of time based upon excusable neglect, since no such extension was requested by the cross-appellant. As the court there pointed out, there was no issue involved regarding whether the appellant had notice of the order, since the appellant had *prepared* the order he sought to appeal, and had submitted it to the court for signature. 376 F. 2d at 364.

Two cases are cited for conflict from the 7th Circuit, *Files* v. *City of Rockford*, 440 F. 2d 811 (7th Cir. 1971), and *Brainerd* v. *Beal*, 498 F. 2d 901 (7th Cir.

1974). It takes but a brief quotation to show the lack of conflict between the *Files* case and the decision below:

> "The order dismissing the complaint in this cause was entered October 6, 1969 in open court. All parties were present in court by counsel. There is no contention that the clerk failed to give notice of the entry of said order to attorneys for all parties. See Rule 77(d) F.R.Civ.P." 440 F. 2d at 813.

The court further noted that the lower court had merely purported to extend the time for filing the appeal and neither the motion requesting the extension, nor the order granting it, recited any grounds for finding excusable neglect. The court also independently reviewed the record and determined that no such grounds were present even if appellant had sought the extension on this basis. The court acknowledged the "unique circumstances" exception, but held that none were present in that case.

In *Brainerd*, *supra*, the notice of appeal was filed more than thirty days beyond the entering of the judgment, and no request for extension based upon excusable neglect was made. There was no contention that counsel did not have notice of the entry of the judgment, and the court in independently reviewing the record, found no facts to support a finding of excusable neglect had counsel sought an extension on that ground. Although this case does not present conflict, it is interesting to note that the court cited its previous opinion in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 303 F. 2d 609 (7th Cir. 1962) in support of its ruling. This is the case, which on appeal to this Court,

was reversed resulting in the creation of the "unique circumstances" doctrine. *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 1962, 371 U.S. 125, 83 S. Ct. 283, 9 L. Ed. 2d 261.

Finally, from the 10th Circuit, Petitioner has cited the case of *Lathrop* v. *Oklahoma City Housing Authority*, 438 F. 2d 914 (10th Cir. 1971), cert. den. 404 U.S. 940, 92 S. Ct. 132, 30 L. Ed. 2d 73. In *Lathrop*, there was a simple failure to file the notice of appeal on time, which appellant tried to overcome by the sole allegation that notice of the judgment had not been received. Nothing was cited in the opinion regarding whether or not counsel had attempted to learn of the judgment prior to the running of the appeal time, and no reliance on any action taken by the clerk or the court was cited. While Petitioner would like this Court to believe that this is the factual setting of the present case, both the order of the District Court setting aside its first judgment (Pet.'s App. C, p. C-1 thru C-5) and the decision of the Court below demonstrate that it is not.

Further evidence of the lack of conflict of the decision below with *Lathrop, supra,* is found in the Fifth Circuit's analysis of its own prior decisions in *Smith* v. *Jackson Tool and Die, Inc.*, 426 F. 2d 5 (5th Cir. 1970), and *In Re Morrow*, 502 F. 2d 520 (5th Cir. 1974). In *Smith*, counsel for appellant had requested the court to delay entering its judgment, and opposing counsel agreed to the delay. Without notifying counsel for appellant, the court entered judgment, and neither side was informed of its action. In that case, the Fifth Circuit held that there were unique circumstances *in addition to the failure of the clerk to notify the parties of the judgment* which justified setting aside the judgment under 60(b)(6).

In *Morrow, supra,* there was nothing in addition to the failure of the clerk to notify the parties. In that case, just as the Tenth Circuit did in *Lathrop, supra,* the Fifth Circuit refused to uphold the setting aside of the judgement to preserve the right of appeal. A reading of the decision of the Court of Appeals in this case will show that the Court carefully considered its prior decisions in *Smith* and *Morrow*, and found that in the case at bar, just as in *Smith*, there were additional unique circumstances over and above the failure of the clerk to give notice. Accordingly, the *Lathrop* case does not present a conflict with the decision of the Court below, and is in accord with the similar decision of the Fifth Circuit in *Morrow*.

Respondents regret that Petitioner's mere listing of cases claimed to be in conflict with the decision below necessitated this lengthy analysis of largely inapposite cases, but the analysis demonstrates that there is no conflict among the circuits on the narrow issue raised by the Fifth Circuit's holding that it had jurisdiction of this cause.

C.

Petitioner's contention that the jurisdictional issue involved here is of equal importance to those instances where this Court has granted certiorari to determine the question of when a judgment becomes final is a gross exaggeration. Resolution of the jurisdictional issue involved in this appeal by this Court would only affect those extremely rare instances in which the clerk of the district court fails to discharge his simplest and most clearly mandated duty under Rule 77(d), and in which there are *additional unique circumstances* justifying the exercise of the court's discretion under Rule 60(b)(6).

The resolution of the true issue involved in the Court of Appeals' holding relating to jurisdiction would not have any effect whatsoever on the decisions cited by Petitioner for conflict, except *Radack, supra,* since all of them are distinguishable on their facts. The only decisions which could possibly be affected by a review by this Court are the decisions in *Expeditions Unlimited, Radack,* and *Smith, supra,* all of which support the Fifth Circuit's decision. These cases represent an infinitesimal percentage of the cases reaching the appellate level of the Federal court system.

Surely this Court need not spend its valuable time ruling on a question which only arises as a result of a rare failure on the part of both a District Court and its Clerk, and which has as its basic premise the proposition that the district courts cannot fairly discharge their duty under Rule 60(b)(6) in these very limited instances, and that the courts of appeal cannot fairly review such decisions.

RESPONSE TO PETITIONER'S REASON II:

Petitioner Is Complaining of an Irregularity Which Caused No Prejudice to Petitioner, Was Treated As Frivolous by the Court of Appeals, and Deserves the Same Treatment Here.

Petitioner's reason II also grossly overstates the import of the Court of Appeals' decision. Reason II claims that the Court of Appeals has attempted to revolutionize appellate procedure by dispensing with the requirement of filing a notice of appeal.

The minor irregularity that gives rise to Petitoner's complaint is not fatal to the claims of Usaform Pan American Limited ("Pan Am"), and can be easily explained.

Petitioner's complaint is that Pan Am did not file a notice of appeal from the judgment of the District Court. In truth, what happened is that Pan Am's *name* did not appear in the listing of appellants contained in the notice of appeal. When one examines the first page of the District Court's "Findings of Fact and Conclusions of Law" and "Final Judgment", both as entered on August 2, 1973 (Pet.'s App. D, p. D-1 and D-26) and as re-entered on January 14, 1974 (Pet.'s App. B, p. B-1 and B-26), the source of the irregularity is easily seen. The listing of the parties defendant in the style of those documents lists all of the Respondents *except* Pan Am, although Pan Am's claims are adjudicated therein. Respondents were understandably hasty in filing their notice of appeal from the re-entered judgment of the District Court, and the error is easily explained as resulting from taking the listing of appellants from the District Court's listing in the judgment being appealed. The error is obviously clerical and one of mere oversight.

It should be noted that this point was raised in the court below, albeit half-heartedly, and the Court of Appeals apparently thought it frivolous to the point of not deserving mention, there being not one sentence on this point in the Court of Appeals' lengthy opinion.

It is the filing of a notice of appeal which reasonably apprises the opposing party that an appeal is being taken that is required by the rules. It has been held on numerous occasions that irregularities in the notice will not be considered fatal where no prejudice to the opposing party occurs. *Jones* v. *Chaney and Janes,* 399 F. 2d 84 (5th Cir. 1968), *Wright* v. *American Home Assurance Company,* 488 F. 2d (10th Cir. 1974).

In *Brubaker* v. *Board of Education, School District 149*, 502 F. 2d 973 (7th Cir. 1973), cert. den. 419 U.S. 1039, 95 S. Ct. 1953, the court found no trouble in overlooking the absence of a party's name in the notice of appeal, where the intent of the notice was apparent and no prejudice could have occurred to the opposing party.

It is not surprising that Petitioner has not attempted to allege that it was prejudiced by the irregularity. It had been engaged in litigation with Pan Am along with the other Respondents for eleven years when the notice of appeal was filed (including two previous appeals to the Fifth Circuit); the last proceeding before the District Court had involved no new facts and involved an application of the same legal principles between Petitioner and all Respondents *including Pan Am;* the notice of appeal accurately referred to the findings, conclusions and final judgment which were entered against all Respondents *including Pan Am* in the same documents and on the same legal grounds. In fact, Petitioner could have made no other conclusion on receipt of the notice of appeal than that Pan Am's name did not appear due to a clerical error. This was the case beyond question.

RESPONSE TO PETITIONER'S REASON III:

Petitioner's Complaints Are Predicated Upon a Misinterpretation of the Decision Below, and Are Therefore Fallacious.

Petitioner's reason III is predicated upon a serious misinterpretation of the decision of the Court of Appeals.

Petitioner seeks to attribute to the decision of the Court of Appeals an intention to ignore or misapply

state law in a diversity suit, to create new presumptions never before known, and to place a burden of proof on Petitioner that it should not be required to bear.

Petitioner gets off on the wrong foot immediately by attributing to the Court of Appeals a quotation which was in fact the language of the District Court in its first opinion (Pet., p. 28). It is true that the Court of Appeals adopted as controlling the quoted language to the effect that Petitioner, in issuing the bond, walked into the loss with its eyes wide open. However, the reason that the Court of Appeals adopted this language as controlling was that the Court's 1972 opinion in this case *specifically affirmed* that District Court finding, and not because of any preconceived intention of the Court of Appeals to ignore the language of the bond, nor because of any prejudice against Petitioner by the author of the opinion. (Petitioner insists on insinuating the existence of such prejudice throughout the Petition, without foundation.)

Unfortunately, the extent of the confusion generated by Petitioner in its reason III requires going back to the previous decision of the Court of Appeals (referred to as the 1972 opinion) for clarification. *Fidelity and Deposit Company of Maryland* v. *Usaform Hail Pool, Inc.*, 463 F. 2d 4 (5th Cir. 1972) (Pet.'s App. E). That decision, while not carefully defining the sole legal principle to be applied on remand in the District Court, nevertheless limited remand to one narrow issue—whether or not monies diverted from premium accounts of an insured corporation were used for legitimate corporate obligations of *that corporation.* With respect to the remaining issues, the Court stated:

> "We have carefully reviewed all other grounds asserted by appellant and affirm the District Court in all other respects." 463 F. 2d at 7 (Pet.'s App. E, p. E-6),

thereby eliminating these issues on remand.

The District Court's decision following remand sought to go back and alter many of the findings and conclusions which had been foreclosed by the above-quoted language of the 1972 decision of the Court of Appeals. The action of the Court of Appeals in disregarding the findings and conclusions of the District Court on issues which were not open to it on remand therefore does not constitute a violation of the doctrine of *Erie Railroad Company* v. *Tompkins*, 1938, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, as Petitioner would have this Court believe. It is a simple application of the doctrine of the law of the case and the superiority of the Court of Appeals over the District Court. Once the Court of Appeals had previously considered, and specifically affirmed, the findings of the District Court, they were no longer open for further consideration by the District Court.

The fact that this was the rationale of the decision of the Court of Appeals in this case is easily illustrated by reference to the opinion. Citing the *first* decision of the District Court, the Court below stated:

> "The trial court rendered a carefully considered opinion and made findings of facts, *many of which govern the present appeal.*" (Emphasis supplied) 523 F. 2d at 751 (Pet.'s App. A, p. A-16).

Later, again referring to the *first* District Court decision, the Court said:

> "The [District] Court did not address the issue of whether the uses to which the wrongfully transferred funds were put were 'legitimate' or 'proper' corporate purposes. This turned out to be the only issue upon which we remanded the case to the District Court in our 1972 opinion." 523 F. 2d at 754 (Pet's. App. A, p. A-21).

Further along, the Court said:

> "The District Court in its first opinion had carefully analyzed the claimants' position on a company-by-company basis. 318 F. Supp. 1301. That approach was in no way challenged by this Court; rather, we took care to state that the District Court's determination was affirmed in all other respects. 463 F. 2d at 7." 523 F. 2d at 756 (Pet's. App. A, p. A-26).

Additional examples are:

> "The findings of fraud and dishonesty were clear and pervasive in the District Court's first opinion, and they were affirmed in our 1972 opinion. The issue on remand was loss—whether the wrongfully appropriated monies went to pay legitimate corporate obligations (in which case there would be no 'loss') or whether they were made for any other purpose (in which case there would be a 'loss')." 523 F. 2d at 757 (Pet.'s App. A, p. A-26).

* * *

> "The District Court in its earlier opinion found that 'the named insureds were *all insolvent at all times* when the . . . illegal transfers were being made. . .' 318 F. Supp. at 1308 (emphasis added). Because the only issue on remand from our 1972

decision was whether the wrongfully appropriated funds were used to pay legitimate corporate obligations, this finding—indeed, all findings and conclusions of the District Court in its first opinion not germane to the issue on remand—were binding upon the District Court." [Cites omitted] 523 F. 2d at 759 (Pet's. App. A, p. A-30, 31).

* * *

"We repeat that the Court's earlier findings of fraud and dishonesty were affirmed by this Court in its 1972 opinion and were not open to reconsideration on remand." 523 F. 2d at 762 (Pet's. App. A, p. A-38).

* * *

> "The District Court has acted conscientiously and has taken great pains throughout the course of this litigation. Our examination of record leaves us to conclude, however, that the Court misapprehended the mandate of the 1972 opinion of this Court." 523 F. 2d at 767 (Pet's. App. A, p. A-48, 49).

With this analysis of the decision of the Court of Appeals in mind, Petitioner's contentions fall like a house of cards.

Petitioner contends that the Court of Appeals eliminated the requirement of showing that loss under the bond was caused by fraud and dishonesty. What the Court said was that the requirement of proving fraud and dishonesty to the extent necessary for recovery under the bond had *already been proven* by Respondents, and was no longer an issue in the case. The status of the case following the prior appeal was that fraud and dishonesty as a *causative element* had been

proven, and the sole and critical question remaining was where the fraudulently diverted money went. The entire meaning of the 1972 opinion was that it is possible to have fraud and dishonesty on creditors of the insured corporation without a loss to the insured corporation, but where the fraud and dishonesty in a continuous sequence of events results in an expenditure for non-legitimate reasons, viewed from the perspective of the insured corporation, a loss occurs as defined in the bond. Accordingly, while the issue on remand was broadly referred to as "loss", it was really whether or not only one of the many elements of loss was present, all of the other necessary elements for proving loss having already been proven.

Petitioner's argument that the Court of Appeals shifted the burden of proof of loss also collapses under analysis. The Court of Appeals first noted that the vast bulk of the burden to be carried by Respondents *has* been carried. The one issue remaining to be decided on remand affects the whole question of whether there will be any recovery and was thus broadly referred to by the Court as the question of whether there was a "loss". The real issue is whether the diverted funds were expended for "legitimate" corporate purposes, which constitutes but one small part of the many-faceted issue of "loss". The .vast majority of the expenditures claimed by Respondents *not* to be legitimate expenditures were intercorporate transfers among corporations with common ownership, directors and officers, and transfers between these corporations and their officers and employees. Where such transfers occur, the general rule of law in America is that the burden of showing legitimacy of such transfers is on the parties intending to uphold them (or on the parties relying

upon the legitimacy of such transfers, such as Petitioner). The burden of proving all of the other elements of loss has always been rightfully placed upon Respondents, as claimants under the bond, and has been carried by them. The single remaining element involved being "legitimacy", and Respondents having carried the burden of showing the necessary interlocking and fiduciary relationships of the transferors and transferees, the burden of proving legitimacy under these undisputed factual circumstances shifts to Petitioner.

Petitioner complains that the Court of Appeals did not apply state law and relied upon a pre-*Erie* case in placing the burden of proof of legitimacy of the intercorporate transfers on Petitioners. However, Petitioners cite no authority for the proposition that this is not the law of the respective states whose law controls under the circumstances. The Court of Appeals chided Petitioner for this same failure. The Court below, in referring to the pre-*Erie* case of *Geddes* v. *Anaconda Copper Mining Company*, 1920, 254 U.S. 590, 41 S. Ct. 209, 65 L. Ed. 425 stated:

> ". . . Fidelity [Petitioner] has not countered the claimants' assertion that the *Anaconda* principles apply to the corporations involved in this case. The full implications of applying those principles to the present case may be further developed on remand." 523 F. 2d at 760 (Pet's. App. A, p. A-31).

Therefore, while the Court assumed that Respondents were correct in claiming that *Anaconda* and the case of *Pepper* v. *Litton*, 1939, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281 control the burden of proof issue, it left room for the District Court on remand to further explore that issue.

Petitioner also paints with a broad brush in claiming that the Court has ignored state law in this diversity suit on the issue of construing an unambiguous contract. However, Petitioner cites only vague and general Florida law that courts cannot ignore the language of unambiguous contracts. The question of ambiguity is one of fact, depending upon the circumstances of the transaction. The Court of Appeals agreed with the Petitioner that the contract was not ambiguous under the circumstances—it simply did not agree with Petitioner's view of what the contract clearly says. If the Court had found that there was ambiguity, it would have resolved it against Petitioner, the bond having been drafted and issued by Petitioner with full knowledge of the factual context existing with respect to the insureds. 523 F. 2d at 755 (Pet's. App. A, p. A-22).

Careful analysis of the Court of Appeals' decision shows that it is guilty of none of the offenses charged in Petitioner's reason III, and further affirmatively shows that it followed the essential requirements of law in holding the District Court to the mandate of the 1972 opinion.

RESPONSE TO PETITIONER'S REASON IV:

The Court of Appeals Did Not Alter Its 1972 Decision, but Merely Clarified It, Although It Had the Power to Alter It Through the Use of Its Sound Discretion.

Petitioner's contention that the Court of Appeals altered its 1972 decision in the 1975 decision, which the Petition seeks to have reviewed, is afflicted with the same misapprehension of the decision below that pervades the other points Petitioner attempts to raise.

Petitioner's argument begins:

> "In violation of both the contract and that opinion [1972 opinion], the Court relied solely on the district court's earlier vacated findings of fraud and dishonesty as to the invasion of the so-called trust funds. . ." (Pet., p. 33).

The excerpts cited above under Respondents' response to reason III catalogue the Court of Appeals' repeated statements that the previous findings relating to fraud and dishonesty were *not* vacated, but rather were specifically *affirmed by* the 1972 opinion.

The Court of Appeals did not undertake to modify the 1972 opinion, but simply sought to clarify it for the benefit of the District Court, whose decision had shown that it was obviously confused by the 1972 decision. All of the Court's references to its 1972 decision are stated in terms of clarification of points on which confusion may have arisen. Not once did the Court of Appeals indicate an intention to deviate from its prior opinion, and it cannot be said that the decision below is clearly inconsistent with the 1972 decision.

Petitioner contends that there was some support in the 1972 opinion for its lately contrived theory that any legitimate corporate purpose of any of the joint insureds is necessarily a legitimate purpose of the others. The Court of Appeals took pains in its recent decision to point out the clear and simple language of the 1972 opinion which should have laid this phony argument to rest, to wit:

> "The reference to 'wash transactions' . . . might be taken to imply that in a case involving a group of corporations related by common ownerships, transactions among corporations are not pr ected by the bond unless the net financial condition of all of the corporations considered together as one were impaired. Our holding in the earlier appeal . . . dispels any such notion when carefully read. It fairly indicates that each corporate tub must stand upon its own bottom. This follows from the reference to 'the taking of money from the premium accounts of an insured company to pay other legitimate obligations of *that company.*' 463 F. 2d at 7." (Emphasis is the Court's) 523 F. 2d at 756 (Pet's. App. A, p. A-25).

While vigorously opposing any contention that the Court of Appeals, with or without intending to do so, altered its 1972 opinion in the decision below, Respondents ask the Court to note that if this were the case, the Court of Appeals had complete power to do so, in the exercise of its discretion, if it determined that its prior decision was erroneous.

It is not surprising that the only case cited by Petitioner for the proposition that the Court acted outside its authority is weak, inapposite, and is probably erroneous in its holding. In that case, *Knapp* v. *North American Rockwell Corp.*, 506 F. 2d 361 (3rd Cir. 1974), the Court made the observation in a footnote that since a different panel of the same Court had previously denied a motion to dismiss for lack of jurisidiction, the panel hearing the merits of the case had no power to reconsider that issue. The first distinction to be made is that the Court there was referring to a ruling on an issue which had already been decided by another panel on the *same* appeal, whereas the present case involves a consideration of a prior decision of the Court in the same case rendered three years earlier, in light of an in-

tervening decision of the District Court on remand. Accordingly, the vision that Petitioner seeks to impart of panels of the same Court of Appeals endlessly feuding over an issue is a mirage.

Secondly, it is generally held that the issue of jurisdiction, which was involved in the *Knapp* case, is *always* open to reconsideration. *Brainerd* v. *Beal,* 498 F. 2d 901 (7th Cir. 1974) (footnote 2, at 902), and thus, *Knapp* was probably erroneous.

Petitioner's argument appears to be that the "law of the case" doctrine prevents the Court below from altering its 1972 opinion. While the "law of the case" doctrine and the superiority of courts of appeals over district courts required the District Court below to adhere to the portions of its first decision affirmed by the 1972 opinion of the Court of Appeals, that doctrine does not prohibit the Court of Appeals from reconsidering its *own* decisions, even those rendered on prior appeals in the same case. This Court has held that the "law of the case" doctrine is a rule of general application, but does not constitute a limitation on the power of an appellate court, acting within its sound discretion, to reconsider its prior rulings in a case. *Messinger* v. *Anderson,* 1912, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152.

Consider also the following excerpt from Moore's Federal Practice:

> "While there is considerable authority in federal cases, usually the older ones, to the effect that the law of the case has the effect of res judicata, the present federal view is *contra* and the doctrine of the law of the case does not carry the same consequences as the rule of res judicata." Moore's Federal Practice (2d Ed. 1974), ¶ 0.404(1), p. 405-406.

See also *Greater Boston Television Corporation* v. *FCC,* 463 F. 2d 268 (D.C. Cir. 1971).

This Court has also held that due process does not compel an appellate court to follow its previous ruling in the same case on subsequent appeals to the same court. *Moss* v. *Ramey,* 1920, 239 U.S. 538, 546-47, 36 S. Ct. 183, 60 L. Ed. 425.

Petitioner has failed to demonstrate any reason why the Court of Appeals abused its discretion, even if it could be demonstrated that any alteration of the 1972 opinion occurred in the recent opinion. No such alteration occurred, and Petitioner has not shown any valid reason why the decision of the Court of Appeals should be reviewed on this issue.

RESPONSE TO PETITIONER'S REASON V:

The Court of Appeals Found That Most of the District Court's Findings Violated the Court's Prior Mandate, Constituting Clear Error.

Petitioner's reliance on the "clearly erroneous" doctrine of Rule 52(a), F.R.Civ.P., contains the same basic fallacy as Petitioner's other contentions.

Petitioner begins its attack by stating that the opinion of the Court of Appeals is "wholly devoid of any finding of evidentiary inadequacy of the elaborate findings prepared and filed by the District Court" (Pet., p. 35).

Petitioner fails to give any weight to the basic premise of the Court of Appeal's decision that the District Court was *not authorized* to make most of the findings of fact that it purported to make. What could be more clearly erroneous in the actions of a district court than entering findings which it is *not allowed* to make? The unauthorized findings pervaded the Dis-

trict Court's decision (constituting more than half of the total findings), which would have merited reversal standing alone. Nevertheless, the Court of Appeals, in the hope of providing guidance for subsequent proceedings, went ahead and examined additional findings which the District Court was arguably authorized to make, pointing out in each instance why these findings were irrelevant to the issue before the Court, and why others were clearly erroneous in light of the evidence.

There is no Rule 52(a) issue present here, and therefore no need for Respondents to discuss the cases Petitioner contends are in conflict with the decision of the Court of Appeals.

RESPONSE TO PETITIONER'S REASON VI:

The Court of Appeals Did Not Change the Law to Be Applied and Therefore No New Trial Is Required.

Petitioner again raises an issue which would be appealing but for the lack of a predicate in the previous proceedings to support its contentions.

Petitioner's reason III had contended that the Court of Appeals changed the law applicable to this case, or ignored the applicable law, contrary to the *Erie* doctrine. Petitioner now claims in its reason IV that if the change in the law *was* properly made, Petitioner should be allowed to retry this cause under the "new" principles. Perhaps Petitioner's ulterior motive is to try to wriggle out of what now appear to have been inadvisable stipulations and to send Respondents back to prove events which happened more than thirteen years ago, prior to commencement of this litigation.

It would probably come as a surprise to the Court of Appeals to learn that it broke new ground in its decision regarding the issue of burden of proof. The Court of Appeals merely applied the general American rule regarding transactions between closely related corporations which was urged by Respondents to be the applicable law in this case, and the Court further noted the absence of any showing by Petitioner that such was not the law to be applied. In addition, the Court left the District Court to explore the full implications of applying these principles on remand.

It remains the duty of the District Court on remand to apply the applicable law in effect at the pertinent times to determine the legitimacy of the corporate transfers. The decision of the Court of Appeals recognizes that the full factual context of these transfers is covered by the record of the trial, primarily by stipulations as to indisputable facts. 523 F. 2d at 751-52 (Pet.'s App. A, p. A-16).

Petitioner, a professional surety which received a premium for the protection it has doggedly fought to avoid for thirteen years, now claims at this late date the right to re-try this case, underscoring its determination to avoid to the bitter end the payment of just claims of Respondents which are amply supported in the trial record.

CONCLUSION

Respondents have demonstrated that Petitioner's reasons for requesting review by this Court are based on erroneous predicates not supported by the prior proceedings in this cause nor by the authorities it cites, and it is respectfully requested that the Court deny the

Petition in order that this cause, which has been too long pending, may reach its just resolution.

Respectfully submitted,

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